

1718. July 25.

The CREDITORS of Auchinvole *against* The DAUGHTERS of Blair of Auchinvole.

THE lands of Auchinvole being sold at a roup, and the daughters of the former heritor being ranked amongst the creditors, the expense of the sale and ranking was divided and proportioned upon every creditor, according to the shares they were to draw of the price. The onerous and stranger creditors *alleged*, That the whole expense of the sale and ranking ought to affect the share of the daughters, whose preference was founded on bonds of provision, or contracts of marriage, who never could compete with onerous creditors. It was *answered*, That the expenses of sales and ranking were ordered, by an act of sederunt 23d November 1711, to be proportioned and divided as has been done in this case: The words are, 'That the account of the whole expense be produced before the Ordinary of the sale, and by him considered, liquidated, and stated upon the price, at so much upon the L. 100; which is immediately to be paid by the purchaser, and detained by him off the creditors having right, as accords.' It was *replied*, That rule was only applicable to onerous creditors; but provisions to children being *quoad* them to be reckoned gratuitous, they could draw nothing until the other creditors were paid of all; for, as the creditors could recur upon the debtor if he had purchased a separate estate, in so far as the rents were diminished, so could they recur upon children.

It was *duplicated*; When sales were first introduced, the practice was, that the factor of the sequestrated estate advanced the necessary expense, which was allowed in his accounts; whereby the subject of the estate was diminished; and by consequence the whole expense fell upon the last creditor; and often it happened that some creditor was thereby wholly excluded. But the Lords taking a general consideration of the case, they found that rankings and sales were a common benefit to the creditors, and therefore the charges ought to be a common burden, affecting first and last creditor equally and proportionally. And if the grounds of law pleaded against the daughters were good, the former abuse would still continue; for the first creditor is as much preferable for his whole demand to the second, and the second to the third, &c. as the whole onerous creditors are to the daughters: And the ground of preference to creditors is the act of Parliament 1621. And it often happens in ranking, that debts reduced upon the said act of Parliament, in competition with more timely diligence of others, and ranked in the next place, do nevertheless bear no greater share of the common expense, than the creditors reducing, and preferred by virtue of the said act. Besides, it is to be observed, that bonds of provision for daughters, or obligations in their mothers contracts, do state these daughters as true and onerous creditors; though others may be preferred on the account of latency, and they are not in the same case as heirs of provision; but they plead upon the general ground of law, that whatever creditor obtains a place in

No 5.

The expense in rankings and sales of bankrupt estates comes equally off all the creditors.

No 5. the ranking falling within the price, all must bear their share of the common expense.

THE LORDS found, that the common expense did affect the whole creditors in their ranking equally and proportionally, according to the shares they draw of the price.

Fol. Dic. v. 1. p. 286. Rem. Dec. v. 1. No 13. p. 26.

1727: July. CREDITORS OF ABBOTSHALL, Competing.

No 6.
Expenses in a ranking proportioned among the whole creditors. How this is done, where there are liferenters.

UPON a bankrupt estate, there were three classes of creditors, *imo*, The preferable creditors, who were instantly to draw their whole debts out of the price; *2do*, the creditors in annuities for life, who were to draw yearly the annualrents of a part of the price left for that end in the purchaser's hands; *3tio*, the other creditors, who, upon termination of the liferents, were to draw the principal sum. It was *contended*, with regard to the expenses of the ranking and sale, That the method of proportioning the same, founded in the act of sederunt, and followed in practice, is, that the whole expense be paid by the purchaser in the first place, a proportion whereof to be detained from the preferable creditors drawing their payments; and as to the remainder, the interest to be deducted yearly from the liferenters, and the principal from the creditors when the liferent is run out. Notwithstanding of which, the LORDS ordained the expenses of the ranking and sale to be proportioned on the whole creditors who are now, and at the event of the liferenter's death, to draw the price; and that a deduction be made accordingly. And, further, in regard there could be no retention till that time, off the creditors who only draw their payment at the death of the liferenters, therefore ordained the proportional expense which falls to their share, *pro loco et tempore*, to be also further proportioned on these creditors who now draw payment; and ordained the same to be retained accordingly: And ordained the purchaser to repay them the said sums, without annualrent, at the first term of Whitsunday or Martinmas after the death of the liferenters, and to detain the same from the creditors entitled to draw the price liferented. See APPENDIX.

Fol. Dic. v. 1. p. 286.

No 7. 1738. February 3. NICOLSON against HIS FATHER'S CREDITORS.

IN a sale carried on by an apparent heir, if there be no reversion, the expense must be proportioned among the creditors in terms of the act of sederunt 1711, being in that case in *rem versum* of the creditors, and not of the heir. See APPENDIX.

Fol. Dic. v. 1. p. 286.